

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CHARLES P. VOELKER	:	ORDER
	:	DTA NO. 820542
for Redetermination of Deficiencies or for Refund of	:	
New York State Personal Income Tax under Article 22	:	
of the Tax Law for the Year 2001.	:	

Petitioner, Charles P. Voelker, 603 Catlyn Court, Delmar, New York 12054-9654, filed a petition for redetermination of deficiencies or for refund of New York State personal income tax under Article 22 of the Tax Law for the year 2001.

On July 20, 2005, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). By a letter dated August 10, 2005, the date by which the parties could file responses to the Notice of Intent to Dismiss was extended to September 19, 2005, which date commenced the 90-day period for issuance of this Order (20 NYCRR 3005.5[d]; 3009.9[a][4]). On September 15, 2005, the Division of Taxation, by Christopher C. O'Brien, Esq. (John E. Matthews, Esq., of counsel), submitted affidavits and other documents in support of dismissal. Petitioner did not file any response in opposition to dismissal. After due consideration of the documents and arguments submitted, Dennis M. Galliher, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner timely filed either a Request for a Conciliation Conference with the Division of Taxation's Bureau of Conciliation and Mediation Services or a petition with the Division of Tax Appeals following the issuance of three notices of deficiency.

FINDINGS OF FACT

1. Petitioner, Charles P. Voelker, filed a petition with the Division of Tax Appeals challenging the merits of three notices of deficiency issued against him by the Division of Taxation ("Division"). Each notice is dated September 8, 2003 and, for the withholding tax period specified on each notice, asserts a penalty equal to the unpaid withholding taxes owed by Heritage Baseball, LLC ("Heritage") against petitioner as an officer or person responsible to collect, account for and remit such taxes on behalf of Heritage, as follows:

NOTICE DATE	NOTICE NUMBER	PENALTY	PERIOD ENDED
September 8, 2003	L-022977568-5	\$2,769.57	June 30, 2001
September 8, 2003	L-022977566-8	\$3,484.89	September 30, 2001
September 8, 2003	L-022977567-7	\$ 954.71	December 30, 2001

2. The petition filed in this matter was verified by petitioner on May 13, 2005, and the envelope in which it was mailed bears a machine metered postmark dated May 13, 2005. Both the envelope and the petition are in-date stamped as received by the Division of Tax Appeals on May 16, 2005. The petition lists petitioner's address as :

Charles P. Voelker
603 Catlyn Court
Delmar, New York 12054

3. The petition states that the Division "did file all of the deficiencies [at issue]," goes on to claim that the same are in error on the merits because petitioner was not properly responsible

for the payment of taxes on behalf of Heritage, and states that “[a]ttached is the pleadings in the underlying Article 78 proceeding in which the Division of Tax Appeals advised that an action can still be brought.”

4. On July 20, 2005, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition. The Notice of Intent to Dismiss Petition indicates that the notices of deficiency in this matter appear to have been issued on September 8, 2003, but that the petition was not filed until May 13, 2005, or 613 days later.

5. In response to the issuance of the Notice of Intent to Dismiss Petition, the Division submitted affidavits made by three of its employees, Heidi Corina, Bruce Peltier and Geraldine Mahon. The Division also submitted copies of the petition with attachments, including the Decision and Order (and accompanying pleadings) filed with regard to the related Article 78 proceeding instituted by petitioner, a copy of the certified mail record (“CMR”) containing a list of the notices of deficiency allegedly issued by the Division on September 8, 2003, copies of United State Postal Service (“USPS”) Form 3811-A and the USPS response thereto, and copies of certain correspondence between petitioner’s attorney and the Division.

6. Notices of deficiency, such as the ones at issue herein, are computer-generated by the Division’s computerized Case and Resource Tracking System (“CARTS”) Control Unit, and are typically part of a batch of such notices generated together. The computer preparation of such notices also includes the preparation of a printout entitled “Certified Record For Presort Mail – Assessments Receivable,” known as a certified mail record (“CMR”). The CMR lists each statutory notice in the order in which it was generated, lists the names and addresses of those taxpayers to whom notices of deficiency are being mailed and also includes, for each such notice, a separate certified control number. The pages of the CMR remained connected to each

other (fan-folded) before and after acceptance of the notices by the USPS through return of the CMR to the CARTS Control Unit.

7. Each computer-generated notice of deficiency is pre-dated with its anticipated mailing date, and each is assigned a certified control number. This number is recorded on the CMR under the columnar heading "Certified No." The next columnar heading, entitled "Reference No.," lists the assessment number assigned to each notice listed on the CMR. The third columnar heading, entitled "Name of Addressee, Street and P.O. Address" lists the names and addresses of the taxpayers to whom the notices are being issued. The remaining columns list the postage and fee amounts for the notices being mailed. The CMR also lists an initial date (the date of its printing) in its upper left corner, set forth in numbers listing the particular year, Julian day of the year and military time of day when such CMR was produced which, in this case, was "20032391730." The date of printing listed on the CMR falls approximately 10 days earlier than the anticipated mailing date for the notices, with such period provided to allow sufficient time for manual review and processing of the notices, including affixation of postage, and mailing. The initial (printing) date on the CMR in this case was manually changed at the time of mailing by Division personnel to September 8, 2003, in order to conform to the actual date of mailing.

8. The certified control number assigned to each notice, as appearing on the CMR, also appears on the front of a separate one-page "Mailing Cover Sheet" (Form DTF-997) that is generated by CARTS for each notice. Each Mailing Cover Sheet also bears, on its front, a bar code, the taxpayer's mailing address and a return address for the Division. The reverse side of each Mailing Cover Sheet carries taxpayer assistance information. CARTS also generates any enclosures referenced within the body of each notice. Ultimately, each notice, accompanied by

its Mailing Cover Sheet and any appropriate enclosures, is a discrete unit within the batch of notices, with the mailing cover sheet being the first sheet in each such unit.

9. After a notice of deficiency is placed in an area designated by the Division's Mail Processing Center for "Outgoing Certified Mail," a staff member in the Mail Processing Center operates a machine which places each notice and the associated documents, as a unit, into a windowed envelope so that the addresses and certified number from the Mailing Cover Sheet show through the windows of the envelope. That staff member then weighs and seals each envelope and affixes "postage" and "fee" amounts thereon. A Mail Processing Center clerk then checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR, and also performs a random review of 30 or fewer pieces of certified mail by checking the letters against the information contained on the CMR. Thereafter, a Mail Processing Center employee delivers the stamped envelopes and associated CMR to one of the various branch offices of the USPS located in the Albany, New York area, in this instance the Colonie Center branch, where a postal employee accepts the envelopes into the custody of the Postal Service and affixes a dated postmark or his signature or initials, or both, to the CMR.

10. In the ordinary course of business a Mail Processing Center employee picks up the CMR from the post office on the following day and returns it to the CARTS Control Unit.

11. In the instant case, the CMR is a 28-page, fan-folded (connected) computer-generated document entitled "Assessments Receivable Certified Record for Non-Presort Mail." All pages were connected when the document was delivered into the possession of the USPS and remained connected when the postmarked document was returned after mailing. This CMR lists 300 certified control numbers. Each such certified control number is assigned to an item of mail listed on the 28 pages of the CMR. Specifically, corresponding to each listed certified control

number is a notice number, the name and address of the addressee, and postage and fee amounts. Each of the pages of the CMR contains eleven entries, with the exception of the last page (page “28”) which contains three entries.

12. Information regarding the notices of deficiency issued to petitioner is contained on page “17” of the CMR, which show the following corresponding certified mailing numbers and assessment numbers:

Certified (Mailing) Number	Reference (Assessment ID) Number
7104-1002-9730-0102-5237	L-022977566
7104-1002-9730-0102-5244	L-022977567
7104-1002-9730-0102-5251	L-022977568

Petitioner’s name, and the address “603 Catlyn Court, Delmar, New York 12054-9654,” appears on the CMR in the column immediately after each of the subject notices of deficiency.

13. Each page of the CMR bears the postmark of the Colonie Center Branch of the U.S. Postal Service, dated September 8, 2003, and the initials of the postal employee, verifying receipt of the items.

14. The last page of the CMR, page “28,” contains a preprinted entry of “300” corresponding to the heading “Total Pieces and Amounts Listed.” Appearing directly to the right of this preprinted entry is the aforementioned September 8, 2003 postmark of the Colonie Center Branch of the USPS and the initials of the Postal Service employee accepting receipt of the items. The affixation of the Postal Service postmarks and the initials of the Postal Service employee indicate that all 300 pieces listed on the CMR were received at the post office.

15. In the ordinary course of business, the CMR is returned to the Division's CARTS unit, and the Division generally does not request, demand or retain return receipts from certified or registered mail.

16. In order to verify delivery of the notices in question and, by logical implication, their prior mailing, the Division prepared and delivered to the USPS three "Requests for Delivery Information/Return Receipt After Mailing" (PS Form 3811-A). This form is used by a mailer to request return receipts after mailing. In this matter, the three forms requested delivery and return receipt information for the three items allegedly mailed to petitioner, which were identified by petitioner's name and address, the certified number related to each of the items, and the September 8, 2003 mailing date. In response, the USPS verified that each of the three items in question were delivered to 603 Catlyn Court, Delmar, New York on September 9, 2003 at 10:51 A.M., and that the scanned signature image of the recipient, K. Voelker, appears above the handwritten name K. Voelker on each of the three USPS delivery records.

17. The facts set forth above in Findings of Fact "6" through "15" were established through the affidavits of Geraldine Mahon and Bruce Peltier, together with the documents attached to and described in such affidavits. Ms. Mahon was employed during the period at issue as the Principal Clerk in the Division's CARTS Control Unit, and her duties included supervising the processing of notices of deficiency. Mr. Peltier was employed during the period at issue as a Mail and Supply Supervisor in the Division's Mail Processing Center, and his duties included supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the U.S. Postal Service. Finding of Fact "16" was established through the affidavit of Heidi Corina, a Legal Assistant employed in the Division's Office of Counsel, together with three copies of the described PS Form 3811-A and the USPS responses thereto.

18. The address on the subject notices of deficiency, 603 Catlyn Court, Delmar, New York 12054, is the same as the address given on the last New York State personal income tax return filed by petitioner prior to the September 8, 2003 date on each of the notices of deficiency in issue, to wit, petitioner's personal income tax return for the year 2002, which was electronically filed with the Division on April 15, 2003.

19. By a Petition and Order to Show Cause dated April 8, 2005, petitioner commenced a Special Proceeding in Supreme Court, Albany County, seeking a stay on collection activities, including an income execution, undertaken by the Division with regard to the subject notices of deficiency until such time as an administrative hearing could be conducted and the validity of the deficiencies asserted against petitioner could be determined.

20. By Notice of Motion dated April 22, 2005 the Division, appearing by Attorney General Eliot Spitzer (Kate H. Nepveu, Esq., of counsel), requested dismissal of petitioner's proceeding on the basis that petitioner had failed to exhaust his administrative remedies and that the petition failed to state a cause of action. An April 21, 2005 affirmation in support of dismissal, made by Division attorney Michael J. Glannon, Esq., stated that petitioner had not filed a request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS") or a petition for a hearing before the Division of Tax Appeals at any point in time, that certain letters sent to the Division by petitioner on June 18, 2004, October 13, 2004 and February 9, 2005 did not constitute either a conference request or a petition, that the liabilities asserted by the notices of deficiency had become fixed and final 90 days after their issuance, and that the Division had properly proceeded to collection activities. Paragraph "10" of the affirmation provided as follows:

Petitioner may still file a petition with the Division of Tax Appeals since he has never done so. The Department [of Taxation] would stop collection activities

during the pendency of the petition and any subsequent Article 78 proceeding. The Division of Tax Appeals would address *some or all of the issues of the matter* including the timeliness of the petition, the issuance of the notices of deficiency and whether petitioner was responsible for withholding tax of Heritage baseball, LLC. (Emphasis added.)

21. By a Decision and Order dated May 9, 2005, Supreme Court Justice Bernard J. Malone, Jr., dismissed the Article 78 proceeding based on petitioner's failure to have exhausted his administrative remedies. Specifically, the Court stated that petitioner had received written notice, at the time the notices of deficiency were issued, of his right to either request a conciliation conference with BCMS or file a petition for a hearing with the Division of Tax Appeals by December 7, 2003. The Court found that petitioner had pursued neither administrative remedy, but instead had his attorney write some letters to the Division. The Court quoted the foregoing paragraph from Attorney Glannon's affirmation in support of dismissal, noted that petitioner could obtain the relief sought in the Article 78 proceeding, i.e., a stay of collection until the administrative hearing is decided, by filing a petition with the Division of Tax Appeals, stated that the only event preventing petitioner from securing the desired relief was his own failure to have filed such a petition and, accordingly, dismissed the proceeding.

22. In response to the dismissal, petitioner filed the petition at issue herein challenging the merits of holding him responsible for the unpaid withholding taxes owed by Heritage. This petition is the first challenge filed with the Division of Tax Appeals in protest against the subject notices. There is no evidence or claim by petitioner that a Request for a Conciliation Conference was filed with BCMS at any point in time with regard to the three notices of deficiency which are at issue in this matter.

23. Petitioner did not respond to the subject Notice of Intent to Dismiss Petition.

CONCLUSIONS OF LAW

A. A taxpayer receiving a notice of deficiency may protest the same by filing a request for a conciliation conference with the Division's BCMS (Tax Law §170[3-a][a]) or, alternatively, filing a petition for a hearing with the Division of Tax Appeals (Tax Law § 681[b]; § 689). Under either alternative, the filing must be made within 90 days after the issuance of the notice of deficiency, and the failure to file within such time period results in the deficiency asserted by the notice ripening into a fixed and final liability. The 90-day filing period is statutory, and it is well established that Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed beyond the 90-day time limit (*see, Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989). In this case, there is no evidence nor is there any claim or argument that petitioner filed a request for a conciliation conference at any point in time, and thus the three notices of deficiency in question would be final and binding upon petitioner unless it can be shown that he filed a timely petition for a hearing with the Division of Tax Appeals.

B. Where, as here, the timeliness of a taxpayer's petition is called to question by the issuance of a Notice of Intent to Dismiss Petition, the initial inquiry focuses on the Division's mailing of the notices of deficiency because a properly mailed income tax notice of deficiency creates an irrebutable presumption that such document was delivered in the normal course of the mail (*see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). However, the "presumption of delivery" does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (*id; Matter of Novar TV & Air Conditioning Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). When a notice is found to have been properly mailed by the Division, i.e., sent to the taxpayer (and his representative, if any) at his last known address by certified or registered mail, the petitioner in

turn bears the burden of proving that a timely protest was filed (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990). However, as noted, the burden of demonstrating proper mailing in the first instance rests with the Division (*id*; *see also*, *Matter of Ruggerite, Inc. v. State Tax Commission*, 97 AD2d 634, 468 NYS2d 945, *affd* 64 NY2d 688, 485 NYS2d 517).

C. The evidence required of the Division in order to establish proper mailing is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of notices of deficiency by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in this particular instance (*see, Matter of Katz, supra*; *Matter of Novar TV & Air Conditioning Sales & Serv., supra*). In this case, the Division has met its burden of establishing proper mailing. As indicated by the CMR and the affidavits of Bruce Peltier and Geraldine Mahon, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing (mailing) such notices, the Division has offered adequate proof to establish the fact that the three notices in issue were actually mailed to petitioner at his last known address, by certified mail, on September 8, 2003, the date appearing on the CMR. The affidavits generally describe the various stages of producing and mailing notices and, in addition, attest to the authenticity and accuracy of the copies of the notices in question and the CMR submitted as evidence of actual mailing. These documents establish that the general mailing procedures described in the Peltier and Mahon affidavits were followed with respect to the notices issued to petitioner. Petitioner's name and address, as well as the numerical information on the face of the notices, appear on the CMR which bears a USPS date stamp of September 8, 2003. There are 300 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated, by affixing his initials and a dated USPS postmark to each page of the CMR, that he received 300 items for mailing. In short, the

Division established that it mailed the notices to petitioner by certified mail on September 8, 2003 (*see, Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995).

D. A notice is issued when it is properly mailed, and it is properly mailed when it is delivered into the custody of the USPS, as described above (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). In this case, the three notices were properly mailed when they were delivered into the custody of the USPS on September 8, 2003, and it is this date which triggered the 90-day period within which a protest had to have been filed (*id*). In turn, 90 days after the September 8, 2003 date of mailing of the notices was December 7, 2003, and in order to be considered timely, petitioner's protest had to have been filed on or before such date. The petition filed with the Division of Tax Appeals in this case was verified on May 13, 2005, the envelope in which it was mailed bears a machine metered postmark (as opposed to USPS postmark) dated May 13, 2005, and is in-date stamped as received by the Division of Tax Appeals on May 16, 2005.¹ Petitioner's filing of his petition on May 16, 2005, in response to notices of deficiency issued on September 8, 2003, was clearly well beyond the 90-day statutory period within which a timely protest had to have been filed.² Unfortunately, as a resulting matter of law there is no jurisdiction to address the merits of petitioner's protest (*Matter of Sak Smoke Shop, supra*), and the petition must be dismissed.

¹ In the absence of a USPS postmark, or of evidence of the date of mailing via one of the IRS approved private delivery services, the operative date for timeliness purposes is the May 16, 2005 date of receipt by the Division of Tax Appeals.

² Assuming, *arguendo*, any of the letters from petitioner to the Division were construed to constitute protests against the notices so as to be treated as either requests for conference or petitions for a hearing, the June 18, 2004, October 13, 2004 and February 9, 2005 dates of such letters (*see*, Finding of Fact "20") similarly fall well beyond the 90-day period within which a protest had to have been filed.

E. The petition of Charles P. Voelker is hereby dismissed.³

DATED: Troy, New York
December 15, 2005

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE

³ Petitioner may not be entirely without recourse in this matter. That is, while the filing of a timely protest allows a taxpayer to challenge a notice of deficiency prior to payment thereof, a taxpayer may still challenge the merits of a notice by making payment and thereafter filing a claim for refund. Accordingly, petitioner may pay the disputed tax sought by the Division via the underlying notices of deficiency and, within two years of payment, file a claim for refund (Tax Law § 689[c]). Upon its denial, petitioner may then proceed with a timely petition for a hearing to contest the refund denial.